

HERMAN CRAIG, d/b/a SMYRNA )  
HOME IMPROVEMENTS, )  
 )  
Plaintiff/Appellee, )  
 )  
v. )  
 )  
CONTINENTAL DEVELOPMENT )  
AND CONSTRUCTION, INC., )  
 )  
Defendant/Appellant. )

Appeal No.  
01-A-01-9512-CV-00548  
  
Williamson Circuit  
No. 95271

**FILED**  
  
January 29, 1997  
  
Cecil W. Crowson  
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COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR WILLIAMSON COUNTY

AT FRANKLIN, TENNESSEE

THE HONORABLE HENRY DENMARK BELL, JUDGE

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REVERSED AND REMANDED

SAMUEL L. LEWIS, JUDGE

# MEMORANDUM OPINION<sup>1</sup>

This is an appeal by defendant/appellant, Continental Development and Construction, Inc. (“CDC”), from a decision of the chancery court denying CDC's claim to a set off. The facts out of which this matter arose are as follows.

CDC hired plaintiff/appellee, Herman Craig, d/b/a Smyrna Home Improvement (“SHI”), to install vinyl siding on homes CDC was building in Williamson County. Following the completion and sale of the homes on which SHI installed siding, the buyers informed CDC of problems they were having with water leaks. CDC conducted an investigation to determine the cause of the leaks. A representative of the window manufacturer inspected the homes and determined that there were no problems with the condition or installation of the windows. An experienced vinyl siding installer, Chip Carrier, also inspected the homes. He determined that SHI improperly installed “J channel,”<sup>2</sup> failed to install flashing, and improperly installed flashing. The record revealed that all the “J channel” on all the windows in two houses needed to be replaced. In the other houses, “J channel” in twenty to twenty-five windows had to be replaced.

On 24 March 1995, SHI filed suit against CDC in the Davidson County General Sessions Court. SHI claimed that CDC owed it money for work it performed. CDC failed to answer or appear in the general sessions court. SHI sought a default judgment, and the court awarded SHI \$7,678.00 in damages.

Thereafter, CDC appealed to the circuit court. CDC claimed that it was entitled to a set off because SHI improperly installed the siding on some of the homes.

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<sup>1</sup> Court of Appeals Rule 10(b):

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

<sup>2</sup> “J channel” is the material used by vinyl siding installers where the siding meets other materials.

Following a bench trial, the chancery court entered an order. The court stated:

2. The Defendant in the present hearing of the case has attempted to defeat the Plaintiff's cause of action by introducing evidence that the Defendant had improperly installed of [sic] vinyl siding materials on certain homes. However, the Defendant's evidence related to improper installation on homes other than those upon which the Plaintiff is now suing, [sic] the Defendant for payment of services rendered. It is the general rule that construction on one property will not be set off, with regards to payment, by the improper prior construction on another property. The Defendant, herein, has attempted to introduce evidence of improper construction unrelated in a large degree to the items upon which the Plaintiff is presently suing for. By virtue of the above, the Plaintiff's claim of set off is denied.

CDC appealed and presented three issues. We deem it necessary under the circumstances to discuss only the first issue of whether "Continental Development [is] entitled to set off over \$5,000.00 in damages it suffered because of [SHI's] defective work against amounts it may owe [SHI]."

Although we agree with the trial court's finding that there was improper installation on homes other than those upon which SHI was suing CDC for services rendered, we cannot agree with the holding that "construction on one property will not be set off, with regards to payment, by the improper prior construction on another property." CDC argued that the trial court failed to distinguish between recoupment and set off. We agree. "Recoupment differs from set off in this respect: that any claim or demand the defendant may have against the plaintiff may be used as a set off, while it is not a subject of recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action." *Howard v. Abernathy*, 751 S.W.2d 432, 434 (Tenn. App. 1988). Moreover, SHI conceded "that Tennessee law provides that the defendant in a collection matter may assert any claim it has against amounts it owes the plaintiff."

Despite our agreement with CDC's argument, we can not decide its issues. There is insufficient evidence in the record upon which to determine the merits of the case. Therefore, we remand the case to the trial court for a new trial.

The judgment of the trial court is reversed and the cause is remanded to the trial court for a new trial as to all issues and any further necessary proceedings. Costs on

appeal are assessed to the plaintiff/appellee, Herman Craig, d/b/a Smyrna Home Improvements.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE,  
MIDDLE SECTION

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WILLIAM C. KOCH, JR., JUDGE